The Defender

VOLUME 13, ISSUE 1 JANUARY 2012

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From The Executive Director's Chair

As a new year dawns WVPDS faces many of the same challenges of previous years.

The Regular Session of the 2012 Legislature began on January 11, 2012. In the first week of the session, budget bills for FY 2013 were introduced in both the House of Delegates and the Senate.

Each bill (House Bill 4013 and Senate Bill 160) proposed very small increases for WVPDS in FY 2013. An increase of less than seven-tenths of one per cent in the line item for public defender corporations has been proposed, while appointed counsel fees were recommended at the FY 2012 rate.

Last year, the Legislature and Governor Earl Ray Tomblin acted swiftly in approving supplemental funding. As a result, WVPDS paid only $7.85 in interest in FY 2011.

As in past years, the funds available for appointed counsel will run out by late March. WVPDS has requested $13,000,000 in supplemental funding for appointed counsel for the remainder of FY 2012, and we are optimistic that the funds will be available prior to any unnecessary delay in payments.

I am hopeful that all concerned parties will communicate with their Legislators regarding the importance of continued prompt funding.

On another note, WVPDS has nearly completed final testing of our On-Line Voucher Submission (OVS) system. The system promises to speed payments by reducing the time spent on receipt and evaluation of submitted vouchers. We are hoping to go live with the system by sometime in February 2012.

In the past few columns, I have briefly mentioned our efforts with the Commission of Special Investigation to investigate and prosecute allegations of fraud involving PDS funds. Past investigations have resulted in the 2011 federal fraud convictions (and concurrent law license annulment) of Martinsburg attorney Heidi J. Myers; the conviction of Myer's office manager for perjury in connection with the investigation; and the recent conviction and sentencing of Point Pleasant attorney Jeremy Vickers for wire fraud.

WVPDS will continue to work closely with the Commission and other agencies to assure that all funds designated for indigent defense are properly utilized.

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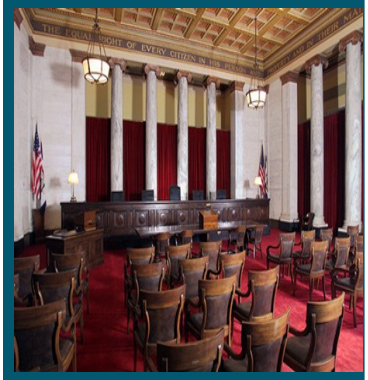

West Virginia Supreme Court Update

State v. Anderson, No. 101367 – September 29, 2011 – Per Curiam

The appellant was convicted of murder of a child by a parent, guardian or custodian pursuant to W. Va. Code §61-8D-2 (1988) and sentenced to life imprisonment without the possibility of parole.

The appellant's child was born in the spring of 2007 and died twelve weeks later. Testimony presented at the trial indicated that the child had suffered substantial neglect during his short life. The appellant's girlfriend (the mother of the child) testified that the appellant was controlling and abusive and would not permit her to feed, administer basic care and hygiene, or seek medical treatment for the child. The mother testified that when she discovered that the child had died in his sleep, the appellant advised her to lie to the emergency personnel regarding the child's feeding and to delay calling 911 until the house was cleaned. The medical examiner testified that the child had died of "sever caretaker maltreatment" and that the manner of death was homicide.

On appeal the appellant argued (1) the evidence was insufficient to support his conviction; (2) that the trial court improperly denied his motion to recuse the prosecuting attorney; (3) that gruesome photographs were erroneously admitted into evidence; and (4) that he was improperly required to appear in court in handcuffs and/or shackles during his trial.

The Court promptly rejected the appellant's insufficiency argument, citing the evidence presented at trial of the pattern of abuse and maltreatment the child had suffered prior to his death.

Prior to trial the appellant's counsel filed a motion to disqualify the prosecuting attorney's office, citing the recent employment by that office of an attorney who had been representing the appellant in the case. The Court rejected the appellant's argument on this point, noting that the trial court had conducted a hearing on the matter and had determined that the former counsel had been effectively and completely screened from involvement in the appellant's prosecution.

In regard to the gruesome photographs issue, the court determined that a series of five pre-and post-mortem photographs of the deceased child, while disturbing, had sufficient probative value to outweigh their prejudicial effect and were admissible to prove material elements of the offense.

As to the appellant's argument regarding the issue of being required to wear handcuffs or shackles while in the courtroom, the Court noted that there was no evidence in the record to suggest that the appellant was restrained in such a manner. The Court rejected the argument of appellate counsel that he had erroneously failed to object when the appellant was brought into court in restraints and that the Court should review the issue under a "plain error" analysis.

Affirmed.

All West Virginia Supreme Court opinions may be reviewed online at www.courtswv.gov

Lawyer Disciplinary Board v. Morgan, No. 35513 – October 25, 2011) – Per Curiam

The respondent attorney was the subject of four separate complaints filed with the Office of Disciplinary Counsel ("ODC"). The complaints alleged numerous instances of misconduct, including failure to appear at scheduled hearing; failure to provide legal services after acceptance of fees; failure to deposit client funds in separate accounts; failure to communicate with clients and failure to respond to inquiries from the ODC.

The respondent stipulated to all of the alleged violations and to various sanctions including, *inter alia*, a public reprimand. In March of 2011 the Court rejected the recommended disposition.

In discussing the appropriate sanction, the Court considered the respondent's stipulation that his conduct had violated duties owed to his clients, the public and the legal profession. The Court disagreed with the determination of the Hearing Panel Subcommittee ("HPS") that the respondent's misconduct was negligent in nature, finding that had the respondent's conduct been merely negligent it would not have been repeated on numerous occasions.

The Court also concluded that the respondent's misconduct had created real injury to his clients, and that consideration of all of the factors in the matter justified a more strict set of

License Suspended and Other Sanctions.

State v. Skidmore, No. 101581 – November 10, 2011) – Per Curiam

The appellant was convicted of first degree murder and sentenced to life imprisonment without the possibility of parole. On appeal the appellant argued (1) the trial court erred by permitting the State to disclose evidence of a prior manslaughter conviction during the penalty phase of the trial, and (2) the court erroneously instructed the jury on the defense of voluntary intoxication.

The State alleged that the appellant had killed the victim, Steve Yarborough, after a dispute over living arrangements at a shared apartment. The State alleged that another roommate had overheard the appellant discussing his disagreement with the victim just prior to the killing, commenting that he would soon be able to get "three hots and a cot". Within minutes of this statement the appellant killed the victim by striking him several times on the head with a hammer.

The appellant argued that the trial court erroneously included the words "gross" and "grossly" in its instruction on voluntary intoxication. The appellant argued that inclusion of these words incorrectly heightened the level of intoxication a defendant must show in order to negate premeditation and deliberation in a first degree murder case.

The Court disagreed, citing numerous cases indicating that a defendant much reach an extreme level of intoxication in order to negate premeditation or deliberation. The Court noted that evidence presented at trial, including evidence that the appellant had made threatening remarks about the victim a few days before the killing, supported the conclusion that the appellant's actions were premeditated. The Court also noted that evidence that the appellant had been drinking on the day of the killing was rebutted by other testimony indicating that the appellant was nonetheless coherent at the time.

The Court also rejected the appellant's argument that admission of his 1987 manslaughter conviction during the penalty phase violated Rule 403 of the Rules of Evidence and *State v. McGinnis*, 193 W. Va. 147, 455 S.E. 2d 516 (1994). The Court noted that *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 691 S.E. 2d 183 (2010), which was decided just before the penalty phase in the appellant's case, specifically stated that a *McGinnis* hearing is not required for sentencing hearings. The Court also noted that had the evidence of the appellant's prior conviction been subject to a Rule 403 analysis, the evidence would have been admissible due to the similarities in the killings.

Affirmed.

In Re: Kasey M., et. al., No. 11 -0203 – November 15, 2011) – Per Curiam

In April 2010 the Department of Health and Human Resources ("DHHR") filed an abuse/ neglect petition against the respondent, Robert C. and his wife. The petition alleged that the children in the respondent's custody, including C.C., the respondent's child from a prior relationship, were endangered by various acts of the respondents.

On November 18, 2010 the DHHR moved to dismiss the allegations against the respondent. The court granted the motion and, upon motion of the DHHR and the guardian *ad litem*, ordered that custody of C.C. be transferred to his biological mother. The respondent objected to this ruling, arguing that the court did not have authority to transfer custody of the child following dismissal of the petition.

The Court agreed and reversed the circuit court's decision. The Court observed that before a circuit court determines a custodial issue in an abuse/neglect proceeding, the court must find that a child has been abused or neglected. No such finding was made in this the respondent's case, and accordingly the court did not have the authority to transfer custody of the child.

Reversed.

Miller, Comm'r, DMV v. Moredock, No. 11-0081 – November 17, 2011) – McHugh, J.

The appellee was arrested in September 2007 and charged with driving under the influence of alcohol. He requested an administrative hearing on the Commissioner's order revoking his driver's license and a hearing was set in February of 2008. The hearing was continued by the hearing examiner but was subsequently held on May 6, 2008.

On October 13, 2009, over seventeen months after the administrative hearing, the Commissioner adopted the hearing examiner's recommendation and ordered the revocation of the appellee's driver's license. The appellee sought review of this order and obtained two stays of the revocation order from the circuit court. The circuit court eventually determined, in an order dated August 9, 2010, that the seventeen month delay in resolving the appellee's administrative hearing was unjustified and violated the appellee's due process rights.

On appeal the appellant argued that the circuit court had erred in failing to find that the appellee had suffered any actual prejudice as a result of the delay. Citing *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E. 2d 847 (2009), which established the requirement of "actual prejudice" in the context of pre-indictment delay, the appellant argued that the appellee had failed to demonstrate any actual prejudice form the seventeen month delay.

The Court determined that the circuit court erred in finding that the delay was "presumptively prejudicial", and that the appellee had failed to show "actual and substantial prejudice" as a result of the delay. The Court further held that even if such delay is shown, the circuit court must balance the resulting prejudice against the reasons for the delay in considering whether a the delay violates a driver's due process rights.

Reversed and Remanded.

State v. McCartney, No. 101457 – November 17, 2011) – Per Curiam

The appellant shot and killed his fiancée, Vicki Page, on the night of December 20, 2008. Brian Joseph, an acquaintance of the appellant who was staying at the home, observed an altercation between the appellant and Ms. Page, but left the home and went to a neighbor's house. The appellant arrived at the neighbor's home a short while later with blood on his clothing and advised that he had just shot Ms. Page.

The police were immediately contacted and the appellant provided a recorded statement indicating that the shooting of Ms. Page was an accident. The appellant also made various remarks during his transportation to the regional jail indicating his belief that Ms. Page and Mr. Joseph were romantically involved.

Prior to his arraignment the following morning, the appellant provided a second statement to the police wherein he repeated that the shooting was an accident and that he had only intended to frighten Ms. Page.

The appellant was subsequently indicted for first degree murder. Just prior to the trial date, the State provided additional discovery information to the appellant, who demanded a trial within the same term of court. Over the appellant's objection, the court continued the trial until February 2010, when the appellant was tried and convicted of first degree murder and sentenced to life without the possibility of parole.

The appellant raised numerous issues on appeal. The Court reviewed discussed each of the assignments, found no reversible error and affirmed the conviction.

The Court held (1) the State's assertion that delayed disclosure of discovery information was based on delays at a forensic laboratory amounted to "good cause" for a continuance past the first term of the indictment; (2) the statement taken from the appellant just prior to his arraignment did not violate the "prompt presentment" rule because there was no evidence that the arraignment was delayed to secure a confession; (3) admission of the murder weapon into evidence without formal chain of custody testimony was not error; (4) testimony of the county coroner along with other undisputed evidence was sufficient to establish the cause of death; (5) the appellant was not denied the right to make a closing statement during the mercy phase of his trial because he did not request the right to make such a statement; (6) the jury instruction on the elements of first degree murder was a correct statement of the elements and was supported by the evidence; (7) various statements by the prosecutor during closing argument did not prejudice the appellant and therefore did not amount to prosecutorial misconduct; (8) a misspelling of Ms. Page's name in the indictment did not amount to a material defect; and (9) the evidence was sufficient to support the first degree murder conviction.

Affirmed.

State v. Haid, No. 35680 – November 23, 2011) – Per Curiam

The appellant was convicted of two counts of third degree sexual assault and sentenced to concurrent one-to-five year prison sentences. On appeal the appellant argued (1) the trial court had erroneously applied the rape shield statute, (2) improper denial of his motion for judgment of acquittal, and (3) improper denial of a requested jury instruction.

The charges against the appellant originated in on-line chats between the appellant and a young woman, S.S., whose Yahoo profile indicated that she was 18 years of age. The appellant and S.S. chatted on-line for several months, culminating in a personal meeting in February 2007. S.S. was actually fifteen years of age, and testified that the appellant picked her up near her home and took her to his Jackson County residence, where she was sexually assaulted.

The appellant denied any sexual contact and testified that after meeting S.S., he discovered her true age and transported her to her boyfriend's house. The State did not present any physical evidence or computer forensic evidence in the trial.

The Court rejected the appellant's argument that the trial court had improperly utilized the rape shield statute. The appellant had sought to cross examine S.S. about prior sexual experiences involving anal intercourse in response to her testimony that the appellant had assaulted her in this manner. The Court held the provisions of the rape shield statute (W. Va. Code § 61-8B-11 (1986)) addressing incapacity to consent based on the victim age specifically prohibited introduction of such evidence.

The Court quickly rejected the appellant's argument that the trial court had erred in denying his motions for judgment of acquittal, stating that the argument were "nothing more than a rehashing of his argument to the jury." The Court noted that in light of the fact that there was no medical or forensic evidence presented, the case was essentially a credibility determination for the jury between the testimony of S.S. and the appellant.

The Court concluded by determining that a proposed addendum to a jury instruction offered by the appellant was properly denied. The court had agreed to instruct the jury as to the effect of uncorroborated testimony of S.S., and the appellant had sought to add a sentence explaining that the jury would not have to find her testimony inherently incredible in order to find the appellant not guilty. The Court held that when the instructions were viewed as a whole,

the jury was properly instructed as to witness credibility and the State's burden of proof.

(The Court also offered a proposed jury instruction to be utilized in cases where the victim's testimony is uncorroborated).

Affirmed.

State v. McFarland, No. 101413 – November 23, 2011) – Per Curiam

The appellant was convicted of second degree sexual assault. Based on a sexual offense conviction in California in 1999, the State filed a recidivist information seeking enhancement of his sentence. The appellant admitted to the information and the appellant was sentenced to twenty to twenty-five years imprisonment.

The State alleged that the appellant met Grant B. and Elizabeth B. at a bar and visited at their home several days later. The appellant and the couple used alcohol and drugs, and after Mr. B. went to bed the appellant and Mrs. B. continued to drink and use drugs. Mrs. B awoke the next morning experiencing signs of sexual assault. A medical examination revealed signs of sexual activity and forensic testing revealed the presence of the appellant's DNA on Mrs. B's pants.

The State's theory was that the appellant had digitally penetrated Mrs. B. while she was physically helpless and masturbated, thus accounting for the DNA evidence. To support this theory, the State presented evidence that the appellant had been convicted of a similar offense in 1999. Relying on the admission of this Rule 404 (b) evidence, the State vigorously argued that the appellant had been convicted of doing "the exact same thing" and "[this] is how he gets off".

The Court rejected the appellant's claim that the evidence was insufficient to sustain his conviction. Citing Mrs. B.'s testimony that she awoke with her pants inside out; that she had injuries consistent with sexual assault; the presence of the appellant's DNA on Mrs. B.'s clothing; and testimony regarding the intoxicants used by both parties, the Court held that there was sufficient evidence for a rational trier of fact to find the essential elements of second degree sexual assault.

However, the Court found that admission of the appellant's 1999 conviction violated Rule 404(b) of the Rules of Evidence and *State v. McGinnis*, 193 W. Va. 147, 455 S.E. 2d 516 (1994).

The Court found that the evidence was not admitted for a legitimate purpose under Rule 404(b), in that the State indicated that the evidence showed "motive or plan", and the evidence had no relevancy to the appellant's motive for sexually assaulting Mrs. B. The Court further explained that "absent the evidence of prior bad acts, the evidence at trial was insufficient to show the manner in which [appellant] sexually assaulted Mrs. B….[i]n other words, the State used the prior bad acts evidence to establish its theory in the instant case."

The Court also stated that the admission of the prior bad acts evidence was prejudicial to the appellant, citing the prosecutor's emphasis on the evidence in opening statements, case-in-chief and closings statements. The Court concluded by noting that even if the evidence had been admitted for a proper purpose, the court had failed to conduct the proper balancing test under *McGinnis* and to put such findings on the record.

Reversed and Remanded.

State v. Stewart, No. 101179 – November 28, 2011) – Ketchum, J.

The appellant was convicted of first degree murder in connection with the shooting death of her husband. The couple had been married for thirty-eight years, but at the time of the shooting had been estranged for some time.

The appellant shot her husband during a visit at a hospital intensive care unit. After the shooting, the appellant provided a videotaped statement to the police detailing a history of abuse from her husband and indicating further that she had gone to the hospital intending to commit suicide.

Prior to trial the appellant also indicated that she would be pursuing an alternative defense of Battered Woman's Syndrome ("BWS"). In support of this assertion the defense presented the report of a forensic psychologist who indicated that the appellant "met the profile of a battered spouse". The State filed motions *in limine* to prohibit introduction of the expert testimony and any other evidence of domestic abuse, arguing that BWS was only available in a self-defense context.

The trial court accepted the State's argument, finding that evidence of domestic abuse could only be admitted if there were a "diagnosable" condition of BWS or if the defendant asserted a claim of self-defense. The appellant objected, asserting that *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009) permitted introduction of domestic abuse evidence to show that a defendant's state of mind and negate necessary elements of an offense, such as premeditation or malice.

The Court initially addressed the State's contention that the trial court's ruling prohibiting BWS evidence was preliminary and that the court indicated it would revisit its ruling if the appellant testified as to domestic abuse. The Court rejected this contention, finding that the trial court had unequivocally ruled that it would not permit evidence of BWS absent a specific clinical diagnosis or a self-defense assertion.

After acknowledging the continuing validity of BWS in West Virginia, the Court stated that lack of a self-defense claim was not a sufficient basis for excluding such evidence. Citing *Harden, supra*, the Court stated that such evidence, presented through the testimony of expert witnesses and otherwise, was clearly relevant to show a defendant's state of mind at the time of an offense and possible negate necessary elements of an offense, such as premeditation, deliberation or malice.

The Court also rejected the State's claim that the evidence of domestic abuse was too remote for the appellant to be relevant in the appellant's case. The Court concluded by noting that while presenting alternative theories can be 'fraught with peril", theories such as those advanced by the appellant may be offered.

Reversed and Remanded.

WVPDS - C.L.E. SCHEDULE

Jury Selection and Voir Dire
Ira Mickenberg, Esq.
February 15, 20121 - 9:00 am - 2:30 pm
Holiday Inn Martinsburg
301 Foxcroft Avenue
Martinsburg, West Virginia
Approximately 5.20 general CLE credits
(re-scheduled from prior date)

FOR REGISTRATION INFORMATION PLEASE CONTACT
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SAVE THE DATE!

WVPDS ANNUAL CONFERENCE

June 21-22, 2012
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Registration and Agenda Information Forthcoming

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